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No. 78-630

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1978

STATE OF WASHINGTON,
Appellant,

vs.

UNITED STATES OF AMERICA
and
CONFEDERATED TRIBES AND BANDS
of the YAKIMA INDIAN NATION,
Appellees.

MOTION TO AFFIRM

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MOTION TO AFFIRM

Appellee, Confederated Tribes and Bands of the Yakima Indian Nation, hereinafter called "Yakima Nation", pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the declaratory judgment and permanent restraint filed May 10, 1978 be affirmed on the ground that the questions are so unsubstantial as to not need further argument.

TREATY PROVISIONS INVOLVED

Preamble, Article II, VIII, *Treaty With The Yakimas.* (12 Stat 951):

> Articles of agreement and convention made and concluded at the treatyground, Camp Stevens, Walla-Walla Valley, this ninth day of June, in the

year one thousand eight hundred and fifty-five by and between Isaac I. Stevens, governor and superintendent of Indian Affairs for the Territoy of Washington, on the part of the United States, and the undersigned head chiefs, chiefs, head-men, and delegates of the Yakama, Palouse, Pisquouse, Wenatshapa, Klikatat, Klinquit, Kow-was-say-ee, Li-ay-was, Skin-pah, Wish-ham, Shyiks, Ochechotes, Kahmilt-pah, and Se-ap-cat, confederated tribes and bands of Indians, occupying lands hereinafter bounded and described and lying in Washington Territory, who for the purposes of this treaty are to be considered as one nation, under the name of "YAKAMA", with Kamaiakun as its head chief, on behalf of and acting for said tribes and bands, and being duly authorized thereto by them.

* * *

ARTICLE 2. There is, however, reserved, from the lands above ceded for the use and occupation of the aforesaid confederated tribes and bands of Indians, the tract of land included within the following boundaries to wit:

[DESCRIPTION]

All which tract shall be set apart and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribes and the superintendent and agent. And the said confederated tribes and bands agree to remove to, and settle upon, the same, within one year after the ratification of this treaty. In the mean time it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States; and upon any ground claimed or occupied, if with the permission of the owner or claimant.

ARTICLE 8. The aforesaid confederated tribes and bands of Indians acknowledge their dependence upon the Government of the United States and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations upon the property of such citizens.

And should any one or more of them violate this pledge, and the fact be satisfactory proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of the annuities.

Nor will they make war upon any other tribe, except in self-defense, but will submit all matter of difference between them and other Indians to the Government of the United States or its agent for decision, and abide thereby. And if any of the said confederated tribes and bands of Indians agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

QUESTIONS PRESENTED

Whether the imposition of the State of Washington's cigarette taxing scheme under RCW 82.24, the administrative regulations promulgated thereunder (particularly WAC 458-20-192 and EBT 504.08.192), and any enforcement thereof by seizure or otherwise against the Yakima Nation or its licensed dealers is unlawful in that the cigarette taxing scheme has been pre-empted by tribal ordinance and constitutes an unreasonable interference with tribal self-government.

Whether the imposition of the State of Washing-

ton's tobacco products taxing scheme under RCW 82.26, the administrative regulations promulgated thereunder and any enforcement thereof against the Yakima Nation or its licensed dealers is unlawful in that the legal incidence of the tobacco products tax falls upon the Yakima Nation or its licensed dealers and results in direct taxation of Indian income derived from on reservation activities and imposes an unreasonable intereference with tribal self-government.

Whether the imposition of the State of Washington's sales taxing scheme under RCW 82.08, the administrative regulations promulgated thereunder (particularly WAS 458-20-192 and EBT 504.08.192), and any enforcement thereof by assessment, seizure or otherwise against the Yakima Nation or its licensed dealers upon the sales of cigarettes is unlawful in that the sales taxing scheme has been pre-empted by tribal ordinance and constitutes an unreasonable interference with tribal self-government.

Whether the imposition of a requirement under RCW 82.08.070, 82.24.090, 82.26.060, WAC 458-20-192 and ETB 504.08.192 that the Yakima Nation and its members keep records of transactions declared (in one through three above) or conceded to be non-taxable is unlawful.

STATEMENT OF THE CASE

The Yakima Nation objects to Washington's State-

ment of the Case in that it omits certain pertinent facts essential to a full and accurate statement.

Yakima Nation is a *sovereign* Indian tribe. Washington agrees and the court below so found. The sovereign Yakima Nation *explicitly* reserved the right to be governed by "their own government" and "their own laws".[1]

In its capacity as such a sovereign Indian tribe exercising its reserved powers, the Yakima Nation has established and is engaged in the operation of various business enterprises. One of these enterprises, an aircraft sales, charter and service business, is operated as a state chartered corporation outside of the exterior boundaries of the Yakima Indian Reservation and this enterprise pays all state taxes applicable to the operation of this business. State taxes regarding this enterprise is not in issue. The Yakima Nation also operated other businesses as tribal enterprises within the exterior boundaries of the Yakima Indian Reservation. These reservation businesses, that are solely owned and operated by the Yakima Indian Nation as tribal enterprises, are: timber harvesting, land rental and crop growing, furniture manufacturing, boat and housing component manufacturing, fish and food processing, Indian art and crafts creation, newspaper pub-

[1] *Record of Official Proceedings at the Council in the Walla Valley (June 9-11, 1855).* Filed as Yakima Appendix B in *State of Washington v. Yakima Nation.* October Term 1977, 77-388. Pp. 14-15 of Appendix B.

lication and cigarette distribution. The Yakima Nation asserts that all these enterprises, as operations of tribal self-government, are not subject to the state tax laws. Washington does not now dispute the exemption as regards the timber harvesting enterprise and the land rental and crop growing enterprise. However, Washington contends that the sales of all of these other enterprises, to other than enrolled Yakima members, were subject to state tax laws. Washington has not threatened or engaged in any enforcement procedure to collect sales taxes they contend are due on sales by these tribal enterprises.

The basic controversy arose over cigarette excise taxes on sales by licensed cigarette and tobacco retailers of the Yakima Nation. In its capacity as a sovereign, the Yakima Nation licensed certain of its members to sell cigarettes and tobacco from premises located on trust lands with the exterior boundaries of the Yakima Indian Reservation. By the enactment of a duly promulgated ordinance, approved by the United States of America; provisions were made for the licencing of member retailers and the imposition of a tribal tax of 22.5 cents per each carton sold by these licensed retailers. Licensed retailers were required to purchase their products from the Yakima Nation's tobacco distributing enterprise and in addition to the tax,

a gross profit inures to the benefit of the Yakima Nation.

Profit from the tobacco sales to its licensed retailers, profit from the operation of all tribal enterprises, and taxes collected from sales of tobacco products are used by the Yakima Nation to finance the functions of its tribal government. The Yakima Nation's annual budget, approved by the United States, is in the millions and provides extensive on-reservation governmental services to members and non-members. These enterprises also assist the Yakima Nation in decreasing the above-state average unemployment of its members.

Non-members purchased most of the cigarettes and tobacco products from the Yakima Nation's licensed cigarette and tobacco retailers. Washington summarily assessed its cigarette excise tax against cigarettes possessed and delivered by the tribal enterprise to its licensed retailers. The State also summarily levied a penalty, seized and sold these cigarettes and tobacco products being delivered in interstate commerce and applied the proceeds against the assessment and penalty.

Washington agrees and the court below found that the imposition of the state cigarette excise tax in addition to the Yakima Nation's tax on cigarette sales to non-members would destroy the business of the Yakima Indian Nation's licensed cigarette retailers and

the Yakima Nation's tobacco distributing enterprise.

The court below[2] declared as a basis for injunction, that:

1. *Cigarette tax:* The imposition of the State of Washington cigarette taxing scheme under R.C.W. 82.24, the administrative regulations promulgated thereunder (particularly WAC 458-20-192 and ETB 504.08.192), and any enforcement thereof by assessment seizure or otherwise against the Intervenor-Plaintiff Yakima Indian Nation (Yakima Nation) or its licensed dealers are unlawful in that the cigarette taxing scheme has been preempted by tribal ordinance and constitutes an unreasonable interference with tribal self-government.

2. *Tobacco products tax:* The imposition of the State of Washington tobacco products taxing scheme under R.C.W. 82.26, the administrative regulations promulgated thereunder, if any, and any enforcement thereof against the Yakima Nation or its licensed dealers are unlawful in that the legal incidence of the tobaccco products tax falls upon the Yakima Nation or its licensed dealers and results in a direct taxation of Indian income derived from on-reservation activities.

3. *Sales tax:*

A. Appplication to cigarette sales: The imposition of the State of Washington sales taxing scheme

[2] Appendix B to Jurisdictional Statement. Pp. 67-68.

under R.C.W. 82.08, the administrative regulations promulgated thereunder (particularly WAC 458-20-192 and ETB 504.08.192), and any enforcement thereof by assessment, seizure or otherwise against the Yakima Nation or its licensed dealers upon their sales of cigarettes are unlawful in that the sales taxing scheme on cigarettes has been preempted by tribal ordinance.

B. Application to sales of noncigarette enterprises: The imposition of the State of Washington sales tax under R.C.W. 82.08 on sales by the Yakima Nation's noncigarette retailers to non-Indians is neither preempted by tribal ordinance nor does it constitute an interference with tribal self-government.

Collection, registration, and record keeping: The imposition of a requirement under R.C.W. 82.08.070, 82.24.090, 82.26.060, WAC 458-20-192 and ETB 504.-08.192 that the Yakima Nation and its members keep records of transactions declared (in one through three above) or conceded to be nontaxable is unlawful. However, the imposition of requirements under ETB 504.-08.192, R.C.W. 82.08.050 and R.C.W. 82.08.070 that the Yakima Nation's noncigarette retailers register without fee with the Washington Department of Revenue, collect lawfully applicable taxes, and keep records as to taxable transactions is valid.

The lower court[3] therefore permanently restrained Washington from:

1. Imposing the State of Washington tobacco products tax upon the Yakima Nation and its licensed dealers on the Yakima Indian Reservation.

2. Imposing the State of Washington tobacco products upon the Yakima Nation and its licensed dealers on the Yakima Indian Reservation.

3. Requiring that such sales and sales to Indians be reported to the State of Washington; and

4. Engaging in any action or acting in any manner to assess such taxes upon the Yakima Nation or its licensed dealers or to seize cigarettes, tobacco products or their containers, or to confiscate such cigarettes, tobacco products or their containers, owned, possessed or sold by the Yakima Nation and its licensed dealers.

The lower court then remanded the reserved question of damages to a one judge district court for determination.

The question of the issuance of the permanent restraint on the lower court's interlocutory declaratory judgment has been appealed to this Court pursuant to 28 U.S.C. ¶1253.

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[3] Appendix B to Jurisdictional Statement. Pp. 69-70.

THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT.

A. Permanent Restraint and Declaratory Judgment adhere to this Court's standards.

The affirmance of the judgment and permanent restraint is clearly warranted. Washington ignores the lower court's careful adherence to the holdings of this court in *Moe vs. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976). *Moe*, Supra, explicitly reaffirms *McClanahan vs. State Tax Commission of Arizona*, 411 U.S. 164 (1973), and *Williams vs. Lee*, 358 U.S. 217 (1959).

The Court below, following this court's announced standards in *Moe vs. Confederated Salish and Kootenai Tribes*, Supra, found that Washington's applicable taxation scheme placed an unreasonable burden on the Yakima Nation's reserved powers of self-government or was a prohibited burden or tax falling directly on the Yakima Nation or its members. Washington's Jurisdictional Statement does not contest the lower court's findings of unreasonable or direct burden. Under Rule 15 (c), Revised Rules of this Court, the failure to raise these questions should foreclose plenary determination by this Court.

Washington's principal contention is that substantial federal questions exist because "the political, social and economic consequences of the lower courts holdings are far reaching". It requires not citation of authority

to establish that this Court feels that these non-legal considerations are better left to Congress.

Washington argues that the Yakima Nation does not possess the power to tax non-Indians on the Yakima Reservation. Again, Washington has failed to include this contention in its Statement of Questions presented. Even if Washington had complied with Rule 16 (c) of this Court's Revised Rules, this question is not before this Court. The incidence of the Yakima Nation's tax falls clearly on the sales transaction, is not determined by the status of the buyer, and is collected from the Indian licensed retailer.

However, the Yakima Nation has the power to impose a tax on all persons transacting business within the exterior boundaries of the Yakima Reservation. Washington agreed and the court below found that the Yakima Nation is a sovereign Indian Tribe. These sovereign powers include the power to tax.

The Yakimas were *explicitly* guaranteeed that they were to have "their own government" and were to have "their own laws".[4] Other treaties signed the same day as the Treaty with the Yakimas provide for submission to the laws of the United States but Article VIII of the *Treaty with the Yakimas* merely acknowledges dependency and does not provide for submission to the laws

[4] See Note 1.

of the United States.[5] The Yakima Treaty together with its legislative history in the Treaty Minutes, which are to be read in interpreting the Yakima Treaty, implicitly provides that these internal powers are exclusive.

The *Treaty with the Yakimas* clearly states that the signatory fourteen tribes and bands "for the purposes of this *treaty*, are to be considered as one *Nation*".[6] In *Worcester vs. Georgia* 6 Pet 515 (1832), Chief Justice Marshall explained the legal affect the use of the terms "treaty" and "Nation".

> "The term "Nation" so generally applied to them means a "people distinct from others". The Constitution, by declaring treaties already made, as well as those to be made, to be the Supreme law of the land, has adopted and sanctioned the previous treaties with the Indian Nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "Nation" are words of our own language, selected in our diplomatic and legislative proceedings by ourselves, and have a definite and well understood meaning. We have applied them to Indians, as we have applied them to other nations of the earth.

[5] Compare Article 8 of the *Treaty with Yakima* with Article 8 of the *Treaty with the Walla Walla, Cayuse, etc.* Like Appendix B in note 1, supra, the later treaty is reproduced in 77-388. Yakima Appendix C. Also see: *Worcester v. Georgia*, 6 Pet. 515 (1832):

> "[T]he senate docketing of the law of nations is that a weaker power does not surrender its Independence — its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful without stripping itself of the right of government, and ceasing to be a state."

[6] Preamble. *Treaty with the Yakimas*, Supra.

> *They are applied to all in the same* sense.: (Italics supplied). 6 Pet. 559-560.

As such a nation, the sovereign Yakima Nation, possesses all of powers of sovereignty, including the power to tax, not limited by the treaty or later acts of Congress.

Article II of the *Treaty with the Yakimas* provides that the Yakima Indian Reservation is to be set apart for the exclusive use and benefit of the Yakimas and that no one except United States government personnel is to enter the reserved area without the permission of the Yakimas and the United States.[7] This Court, in *Williams vs. Lee*, 358 U.S. 217, 221 (1958), explained the legal afffect of that language:

> "[I]n return for (Indian) promises to keep peace, this treaty 'set apart' for their permanent home a portion of what has been their native country, and provided that no one, except United States government personnel was to enter the reserved area. *Implicit* in these treaty terms, as it was in the treaties with the Cherokees involved in *Worcester vs. Georgia*, was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government exists."

Absent a controlling Act of Congress, exercise of a tribe's sovereign powers preempts conflicting state laws. This court has so held in *Williams vs. Lee*, supra, at 220-221, and *Fisher vs. District Court*, 424 U.S. 382, (1976).

B. Whether the state may impose taxes, the legal incidence of which fall upon a non-Yakima reservation Indian, is not within this appeal and is not a substantial federal question.

[7] Article 2. *Treaty with the Yakimas*, Supra.

This Court has held that 28 U.S.C. ¶1253, is to be narrowly and stictly construed. *Gonzales vs. Automatic Employee's Credit Union*, 419 U.S. 90 (1974). 28 U.S.C. ¶1253 provides for an appeal from an order granting or denying an injunction. The lower courts determination regarding the exemption from direct taxation of a non-Yakima Indian, is not contained in either the lower court's interlocutory declaratory judgment or the injunctive relief. This Court has held that it is the order, and only the order, that is appelable, *Perez vs. Ledesma*, 401 U.S. 82 (1971).

In any event, the lower court's determination does not raise a substantial federal question. The distinction that Washington makes between Indian people is unwarranted. Congress has defined an "Indian" to be "all persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction". 25 U.S.C. ¶479. The Secretary of Interior and other executive branches follow the same rule. See: C.F.R. ¶161.2; 25 C.F.R. ¶12.3 (c). The federal courts have always recognized the principle that an Indian is not lost from federal view and its protection when he is on a reservation other than his own. *United States vs. Kagama*, 118 U.S. 375 (1886), *United States vs. Dodge*, 538 F 2d 770 (8th Cir. 1976) and *United States vs. Ives*, 504 F 2d 935 (9th Cir. 1974).

CONCLUSION

For the reasons stated herein, this appeal should be affirmed.

Respectfully submitted,

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